Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KERRY CHAPLIN,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals, in refusing to allow a criminal defendant an opportunity to present his arguments on the illegality of a wiretap for the reason that a prior panel of the Court of Appeals in a separate case upheld the validity of the same wiretap, impermissibly applied offensive collateral estoppel to deprive a criminal defendant of his fundamental right to substantive due process?

LIST OF INTERESTED PARTIES

Milton Edwards, Terry Ratliff, Sr., and William T. Lawrence, Jr.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF INTERESTED PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Factual Background	2
B. The Opinion of the District Court	4
C. The Opinion of the Court of Appeals	5
REASONS FOR GRANTING THE PETITION	6
I. THE DECISION OF THE COURT OF APPEALS DEPRIVES CHAPLIN OF HIS FUNDAMENTAL RIGHT OF DUE PROCESS BY DENYING HIM AN OPPORTUNITY TO LITIGATE THE LEGALITY OF THE WIRETAP	6
II. A WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS AS TO WHETHER COLLATERAL ESTOPPEL MAY BE APPLIED OFFENSIVELY AGAINST A CRIMINAL DEFENDANT	8
CONCLUSION	11

TABLE OF AUTHORITIES

CASES — Page

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) 9, 10
Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971) 8
Catches v. United States, 582 F.2d 453 (8th Cir. 1978) 8
Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962) 8
Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940) 8
Hernadez-Uribe v. United States, 515 F.2d 20 (8th Cir. 1975), *cert. denied*, 423 U.S. 1057, 96 S.Ct. 791, 46 L.Ed.2d 647 (1976) 9
Martin v. Wilkes, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989) 6
Pena-Cabanillas v. United States, 394 F.2d 785 (9th Cir. 1968) 9
Sealfon v. United States, 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed.2d 180 (1948) 10
United States v. Bonilla Romero, 836 F.2d 39 (1st Cir. 1987), *cert. denied*, 488 U.S. 817, 109 S.Ct. 55, 102 L.Ed.2d 33 (1988) 6
United States v. Brittain, 41 F.3d 1409 (10th Cir. 1994) 7
United States v. Bruno, 333 F. Supp. 570 (E.D. Pa. 1971) 10
United States v. Colacurcio, 514 F.2d 1 (9th Cir. 1975) 9
United States v. De Angelo, 138 F.2d 466 (3rd Cir. 1943) 10
United States v. Hamilton, 931 F.2d 1046 (5th Cir. 1991) 9
United States v. Harnage, 976 F.2d 633 (11th Cir. 1992) 10
United States v. MacCollum, 426 U.S. 317, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976) 8
United States v. Pelullo, 14 F.3d 881 (3rd Cir. 1994) 10

TABLE OF AUTHORITIES—Continued

	Page
United States v. Rosenberger, 872 F.2d 240 (8th Cir. 1989)	9
United States v. Tavarez, 40 F.3d 1136 (10th Cir. 1994)	5, 7
United States v. Thoresen, 428 F.2d 654 (9th Cir. 1970)	9
STATUTES AND CONSTITUTIONAL PROVISIONS	
U.S. CONST. amend. V (Due Process Clause)	2
18 U.S.C. § 3231	4
18 U.S.C. § 3742(a)	4
21 U.S.C. § 841(a)(1)	2, 4
21 U.S.C. § 843(b)	2, 4
21 U.S.C. § 846	2, 4
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	4
OKLA. STAT. tit. 13, §§ 176.1 *et seq.*	2, 3
MISCELLANEOUS AUTHORITIES	
Comment, The Use of Collateral Estoppel against the Accused, 69 Colum. L. Rev. 515, 516 (1969)	9
1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.411[1] (2d ed. 1994)	6
RESTATEMENT OF JUDGMENTS § 93 (1942)	6
Allan D. Vestal, *Issue Preclusion and Criminal Prosecution*, 65 Iowa L. Rev. 281 (1980)	9

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is reported at 69 F.3d 281. (App. 1a-37a). The opinion of the district court is not reported. (App. 38a-40a).

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1995. On December 1, 1995, the court of appeals denied the petitioner's timely joint petition for

rehearing and suggestion for hearing en banc. (App. 41a-42a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment to the Constitution of the United States, provides in pertinent part:

> . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . .

2. The pertinent sections of the statutes under which the petitioner was prosecuted, though the merits of this petition do not turn upon such sections, were 21 U.S.C. § 841(a)(1), 21 U.S.C. § 843(b), and 21 U.S.C. § 846 and are reproduced at App. 43a-44a.

3. The relevant sections of the Oklahoma Security of Communications Act, OKLA. STAT. tit. 13, §§ 176.1 *et seq.*, though the merits of this petition do not turn upon such sections, are reproduced at App. 44a-46a.

STATEMENT OF THE CASE

A. Factual Background

In the summer of 1990, Milton Edwards ("Edwards") and Terry Ratliff, Sr. ("Ratliff") began purchasing small quantities of cocaine from Balbino Tavarez ("Tavarez") in Houston, Texas for resale near their home in Atoka, Oklahoma. (App. 3a). In July, 1992, Edwards approached Jerry Grist ("Grist") and proposed that Grist transport the cocaine from Houston to Tulsa. (App. 3a).

On April 19, 1993, J. Tully McCoy ("McCoy"), district attorney for Judicial District 21, sought, pursuant to the Oklahoma Security of Communications Act, OKLA. STAT. tit. 13, §§ 176.1-.14 (the "Act"), an *ex parte* order

from the Oklahoma Court of Criminal Appeals to wiretap Grist's residence and business phones in Atoka, Oklahoma. (App. 4a, 8a, 9a). Section 176.9(C) of the Act authorizes the "interception of wire . . . communications within the territorial jurisdiction of the judicial district of the district attorney requesting the order." OKLA. STAT. tit. 13, § 176.9(C). Judicial District 21 includes Cleveland, McCain, and Garvin counties. Atoka is in Atoka County which is in Judicial District 19. (App. 9a). Under the Act, an improper application for a wiretap will render the resulting order invalid. OKLA. STAT. tit. 13, § 176.7.

When the April 19, 1993 order was issued, a wiretap device was placed on telephone lines physically located in Atoka County near Grist's phones. (App. 4a, 9a, 38a, 39a). Electronic signals from that device were then routed by arrangement with the telephone company to a monitor room in Cleveland County where state agents intercepted and recorded calls between Grist and several individuals including the petitioner, Kerry Chaplin ("Chaplin"). (App. 9a, 38a, 39a). As a result of that wiretap, Tavarez, Grist, and others were prosecuted in the Western District of Oklahoma (the *"Tavarez* Suit") and ultimately pled guilty and agreed to cooperate in the prosecution of Chaplin, Edwards, Ratliff and William T. Lawrence ("Lawrence") (collectively, "Defendants"). (App. 4a). Prior to the wiretap of Grist's phones, state agents were unaware of any drug activities of Chaplin.

On September 21, 1993, as part of his effort to "cooperate," Grist contacted Chaplin to see if Chaplin was interested in dealing with his friend "Joe" (DEA special agent Joe Leszczynski). (App. 4a-5a). Through subsequent calls and a one face-to-face meeting, Joe arranged a meeting between Chaplin and Grist's father, Herb Grist. (*Id.*) On November 3, 1993, Chaplin was arrested in Tulsa where he was videotaped purchasing one kilogram of cocaine from cooperating witness Herb Grist. (App. 5a).

B. The Opinion of the District Court [1]

On January 26, 1994, Chaplin was indicted in the United States District Court for the Northern District of Oklahoma (the "District Court") for conspiracy to possess cocaine with intent to distribute and for possession of cocaine with intent to distribute under 21 U.S.C. §§ 846, 841(a)(1), respectively, as well as for use of a communications facility, in facilitating a violation of federal narcotics laws under 21 U.S.C. § 843(b).[2] (App. 6a).

Following their indictment, Defendants filed a motion to suppress asserting that the evidence against them was derived from an illegal wiretap since McCoy lacked jurisdiction to obtain the wiretap order. (App. 8a, 39a). Specifically, Defendants argued that the wiretap was facially invalid because McCoy, as district attorney for Judicial District 21, was not authorized to seek a wiretap on phones located in Judicial District 19 which was outside his territorial jurisdiction. (App. 39a). On April 20, 1994, the District Court, while acknowledging that "[i]t may be reasonably argued that the Oklahoma legislature intended to restrict telephones to be intercepted to be physically located within the jurisdiction of the district attorney applying for the intercept order", nevertheless denied the motion to suppress. (App. 40a).

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[1] The District Court has jurisdiction by virtue of 18 U.S.C. § 3231 which grants district courts original jurisdiction of offenses against the laws of the United States. The United States Court of Appeals for the Tenth Circuit (the "Court of Appeals") has jurisdiction by virtue of 28 U.S.C. § 1291 which grants the courts of appeals jurisdiction over all final judgment of the district courts and by virtue of 18 U.S.C. § 3742(a).

[2] Specifically, Chaplin was charged with one count of conspiracy to possess cocaine with intent to distribute and to distribute cocaine ("Count 1"), five counts of use of a communication facility in furtherance of a narcotics felony ("Counts 2-6"), and one count of possession of cocaine with intent to distribute ("Count 7").

On May 5, 1994, Chaplin was convicted on all of the above counts. (App. 6a). On December 20, 1994, Chaplin was sentenced to 151 months imprisonment on Counts 1 and 7 to run concurrently, forty-eight months on Counts 2-6 as to each count to run concurrently and concurrently with Counts 1 and 7, and fined $5,000.00.

C. The Opinion of the Court of Appeals

On December 22, 1994, Chaplin filed a timely notice of appeal. On appeal, Chaplin asserted *inter alia* that the District Court erred in denying the motion to suppress because the evidence against Chaplin was derived from an illegal wiretap. Rather than reach the merits of the issue, the Court of Appeals relied on its prior decision in the *Tavarez* Suit which upheld the validity of the same wiretap at issue in the instant case. (App. 8a-10a). *See United States v. Tavarez*, 40 F.3d 1136 (10th Cir. 1994). In *Tavarez*, another panel of the Court of Appeals held that under the Act, jurisdiction to apply for an order vests not only in the judicial district where the mechanical devices are located, but also in the place where the contents of the communication are first heard by law enforcement officials. (App. 9a-10a). Accordingly, the prior panel concluded that because McCoy resided in the judicial district where the phone conversations were first heard by DEA agents, McCoy properly had jurisdiction. (App. 10a). The Court of Appeals then concluded that it was bound by its construction of the Act in *Tavarez* absent an intervening Supreme Court precedent or *en banc* reconsideration. (App. 10a). The Court of Appeals so held even though Chaplin was not a party to the *Tavarez* Suit and did not have an opportunity to present his arguments on the invalidity of the wiretap.

REASONS FOR GRANTING THE PETITION

A writ of certiorari should be granted for several reasons. First, in refusing to allow Chaplin an opportunity to present his arguments concerning the illegality of the wiretap, the Court of Appeals impermissibly applied offensive collateral estoppel to deprive Chaplin of his fundamental right to substantive due process. As more fully demonstrated below, such decision was in derogation of the Due Process Clause of the Fifth Amendment of the United States Constitution and conflicts with prior decisions of this Court. In addition to the forgoing reason, the Court should grant the petition for certiorari to resolve a conflict among the circuits as to whether collateral estoppel can be applied offensively against criminal defendants.

I. THE DECISION OF THE COURT OF APPEALS DEPRIVES CHAPLIN OF HIS FUNDAMENTAL RIGHT OF DUE PROCESS BY DENYING HIM AN OPPORTUNITY TO LITIGATE THE LEGALITY OF THE WIRETAP.

As a preliminary matter, it must be recognized that the decision of the Court of Appeal completely ignores the well-established rule that in the case of both *res judicata* and collateral estoppel a judgment is conclusive only against a party of the action in which it was rendered. *See* 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.411[1] (2d ed. 1994); RESTATEMENT OF JUDGMENTS § 93 (1942) ("[A] person who is not a party . . . is not bound by or entitled to claim the benefits of an adjudication"). In other words, the party to be precluded from relitigating an issue decided in a previous litigation, must have been either a party or in privity with a party to that litigation. *United States v. Bonilla Romero*, 836 F.2d 39, 43 (1st Cir. 1987), *cert. denied*, 488 U.S. 817, 109 S.Ct. 55, 102 L.Ed.2d 33 (1988). Indeed, this Court has referred to the foregoing as a principle with which "all agree." *Martin v. Wilkes*, 490 U.S. 755, 761, 109 S.Ct. 2180, 2184, 104 L.Ed.2d 835

(1989). In the instant case, it is uncontested that Chaplin was neither a party nor in privity with a party to the *Tavarez* Suit. Accordingly, Chaplin cannot be bound by determinations rendered in the *Tavarez* Suit and cannot be precluded from litigating the illegality of the wiretap.

Ignoring the above well-established principle, the Court of Appeals held that Chaplin was bound by a prior panel's decision in a separate case to which Chaplin was not a party. Indeed, after citing the prior panel's rejection of a "similar challenge" to the same wiretap in *Tavarez*, the Court of Appeals stated:

> Defendants concede that our decision in *Tavarez* upheld the validity of the wiretap in question. Defendants contend, however, that they were not a party to that case and that we should reconsider the issue and reach a different result. We disagree. We are bound by our authoritative construction of the Oklahoma wiretap statute in *Tavarez* absent an intervening Supreme Court precedent or en banc reconsideration. *United States v. Brittain*, 41 F.3d 1409, 1415 (10th Cir. 1994). Accordingly, we must follow the *Tavarez* panel's construction of the Oklahoma wiretap statute in the instant case.

(App. 10a).

Whatever considerations of policy may bear on matters of *stare decisis*, the *Tavarez* panel's decision adjudicated a legal claim regarding a specific, discrete, historical event—the lawfulness of wiretaps on an individual's phones. Chaplin was not a party to the *Tavarez* case and had no standing there to make his arguments regarding the lawfulness of the wiretap. But he was, nevertheless, prosecuted based on evidence obtained from that wiretap and sought on appeal to be heard on the issue of its lawfulness. Under such circumstances, the Court of Appeal's refusal to consider Chaplin's arguments is tantamount to collaterally estopping him from litigating the issue.

That Chaplin has due process protection to be heard on the lawfulness of a dispositive adjudicative fact in-

volved in his case is demonstrated in *Blonder-Tongue Lab., Inc. v. University of Ill. Found.*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971), a patent-infringement case, where the Court said:

> Some litigants—those who never appeared in a prior action—may not be collaterally estopped without relitigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stands squarely against their position. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

Blonder-Tongue, supra, 402 U.S. at 329. A direct appeal from a district court judgment in a criminal case is a matter of right, *Coppedge v. United States*, 369 U.S. 438, 441, 82 S.Ct. 917, 919, 8 L.Ed.2d 21 (1962), a right that has been described as a "fundamental right of due process," *Catches v. United States*, 582 F.2d 453, 458 (8th Cir. 1978). *Compare United States v. MacCollum*, 426 U.S. 317, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976) (dictum, plurality opinion). In refusing to hear Chaplin's arguments on the illegality of the wiretap, the Court of Appeals deprived Chaplin of his fundamental right to due process of law.

II. A WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS AS TO WHETHER COLLATERAL ESTOPPEL MAY BE APPLIED OFFENSIVELY AGAINST A CRIMINAL DEFENDANT

Even if one were to assume *arguendo* that collateral estoppel could be invoked against Chaplin (which it cannot since he was not a party to the prior litigation), the Court should grant a writ of certiorari to resolve the conflict among the courts of appeals as to whether collateral estoppel may even be invoked by the government against a criminal defendant. Although originally developed in civil cases, collateral estoppel has been applied by this Court in criminal cases for the benefit of the de-

fendant. *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970). This Court has not addressed directly whether collateral estoppel can be applied against the defendant in a criminal case. However, courts as well as commentators have noted that the application of collateral estoppel to criminal defendants raises difficult due process questions. *See e.g., United States v. Hamilton*, 931 F.2d 1046, 1053 n.1 (5th Cir. 1991); Allan D. Vestal, *Issue Preclusion and Criminal Prosecution*, 65 Iowa L.Rev. 281, 312-21 (1980) (expressing concern that application of collateral estoppel against criminal defendants might infringe due process and jury trial rights).

Citing "wise public policy and common sense judicial administration", the Court of Appeals for Ninth Circuit has allowed collateral estoppel to be invoked against a criminal defendant. *Pena-Cabanillas v. United States*, 394 F.2d 785, 786-88 (9th Cir. 1968); *accord United States v. Colacurcio*, 514 F.2d 1, 6-7 (9th Cir. 1975); *see also United States v. Thoresen*, 428 F.2d 654, 666-67 (9th Cir. 1970). The Court of Appeals for the Eighth Circuit has likewise adotped this rule. *See Hernadez-Uribe v. United States*, 515 F.2d 20, 21-22 (8th Cir. 1975), *cert. denied*, 423 U.S. 1057, 96 S.Ct. 791, 46 L.Ed.2d 647 (1976); *United States v. Rosenberger*, 872 F.2d 240, 241-42 (8th Cir. 1989) (defendant collaterally estopped from moving to suppress evidence previously found to be legally obtained). The rationale supporting such decisions has been severely criticized for not paying sufficient attention to the constitutional objections. *See Comment, The Use of Collateral Estoppel against the Accused*, 69 Colum. L.Rev. 515, 516 (1969) ("[t]his practice [of applying collateral estoppel against a criminal defendant] raises serious policy and constitutional issues which have not been adequately dealt with by the courts").

Despite the above cases, "there has been a strong, unelaborated assumption that the doctrine of collateral estoppel cannot be invoked in criminal cases against the

defendant." *United States v. Pelullo*, 14 F.3d 881, 891 (3rd Cir. 1994); *see also United States v. Harnage*, 976 F.2d 633, 634 (11th Cir. 1992) ("[collateral estoppel's] use in the criminal arena, however, has traditionally been limited to only one party—the defendant."). Indeed, Chief Justice Burger, though disagreeing with the Court's ultimate holding, stated that: "[if the defendant] had been convicted at the first trial, presumably no court would then hold that he was thereby foreclosed from litigating the identification issue at the second trial." *Ashe supra* 397 U.S. at 465, 90 S.Ct. at 1205 (Burger, C.J., dissenting). Other courts have similarly concluded. *See United States v. De Angelo*, 138 F.2d 466, 468 (3rd Cir. 1943) ("[a]n accused is constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding with respect thereto.") *cited in Sealfon v. United States*, 332 U.S. 575, 578, 68 S.Ct. 237, 239, 92 L.Ed.2d 180 (1948); *United States v. Bruno*, 333 F.Supp. 570, 576 (E.D. Pa. 1971) ("[a]n accused is always constitutionally entitled to a trial de novo of the facts alleged . . . and collateral estoppel is available as a defense even though *it can never be raised offensively by the prosecution*.") (emphasis supplied). The Eleventh Circuit Court of Appeals has also held that the government cannot collaterally estop a criminal defendant from relitigating an issue decided against a defendant in a different court in a prior proceeding. *See Harnage, supra*, 976 F.2d at 636. In light of the above, a writ of certiorari should be granted for the wholly additional reason that in so doing the Court could resolve the present conflict between the courts of appeals as to whether or not collateral estoppel can be applied against a defendant in a criminal case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

TABLE OF CONTENTS

APPENDIX A — Page

Decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Edwards, et al.*, October 24, 1995 ..... 1a

APPENDIX B

Order of the United States District Court for the Northern District of Oklahoma, Denying Motion to Suppress, *United States v. Edwards, et al.*, April 20, 1994 ..... 38a

APPENDIX C

Order of the United States Court of Appeals for the Tenth Circuit, Denying Petition for Rehearing and Suggestion for Rehearing En Banc, *United States v. Edwards, et al.*, December 1, 1995 ..... 41a

APPENDIX D

Relevant Statutory Provisions 43a

APPENDIX A

[Filed Oct. 24, 1995]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 94-5202

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.

MILTON EDWARDS,
Defendant-Appellant.

No. 94-5203

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.

TERRY RATLIFF, SR.,
Defendant-Appellant.

No. 94-5204

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.

WILLIAM THOMAS LAWRENCE,
Defendant-Appellant.

No. 95-5003

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
KERRY CHAPLIN,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 93-CR-185-C)

Before BALDOCK and McWILLIAMS, Circuit Judges, and BROWN, District Judge.*

BALDOCK, Circuit Judge.

Defendants Milton Edwards, William Lawrence, Jr., Kerry Chaplin, and Terry Ratliff, Sr. were tried together and convicted in a jury trial of conspiracy to possess with intent to distribute cocaine and to distribute cocaine, 21 U.S.C. §§ 846, 841(a)(1). Defendants Chaplin and Edwards were also convicted of use of a communication facility, a telephone, in facilitating a violation of federal narcotics laws, 21 U.S.C. § 843(b). Defendants appeal their convictions and sentences. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We affirm.[1]

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* The Honorable Wesley E. Brown, Senior United States District Judge for the District of Kansas, sitting by designation.

[1] Because Defendants raise common issues, these cases have been consolidated for purposes of appeal.

I. FACTS

Testimony and evidence presented during trial detailed the following course of events. The instant conspiracy arose in the summer of 1990, when Defendants Edwards and Ratliff began purchasing small quantities of cocaine from Balbino "Munchie" Tavarez in Houston, Texas for resale near their home in Atoka, Oklahoma.[2] Over the next two years, Edwards purchased increasing quantities of cocaine from Tavarez but experienced difficulties transporting the cocaine from Houston.

In July 1992, Edwards approached Jerry Grist ("J. Grist") in Atoka, and proposed that J. Grist transport the cocaine from Houston to Tulsa through the use of J. Grist's trucking company employees. J. Grist agreed to this arrangement in exchange for payment of $1,000 per kilogram of cocaine transported. To carry out this plan, Edwards and Ratliff escorted J. Grist to Dallas, Texas to meet with Tavarez. There, J. Grist met with Tavarez, received instructions on making cocaine purchases, and observed Edwards purchase two kilograms of cocaine from Tavarez.

In September 1992, Edwards was placed on probation for an unrelated 1990 drug charge and was placed in a halfway house. During Edwards' confinement, Tavarez arranged transactions directly with J. Grist for Edwards. At this point, Defendant Chaplin began purchasing cocaine from J. Grist which allowed him to obtain better quality cocaine than he was able to obtain on his own. In making these purchases, Chaplin pooled his money into a common fund with the other codefendants in order to make bulk purchases of cocaine, as the price of cocaine was less expensive when purchased in large quantities. At trial, J. Grist estimated that he or his employees routinely transported multiple kilograms of cocaine from

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[2] In a prior appeal, we affirmed Tavarez' conviction for conspiracy to distribute methamphetamine and cocaine. *See United States v. Tavarez*, 40 F.3d 1136 (10th Cir. 1994).

Houston to Tulsa, at least every week, until his arrest on May 9, 1993. Once the cocaine arrived in Tulsa, J. Grist distributed the cocaine among the Defendants who had invested in the purchase.

In February 1993, the district court revoked Edwards' probation and sentenced him to prison. The following September, Edwards contacted J. Grist from prison and informed him that Ratliff would assume control of his portion of the operation. Specifically, Ratliff would communicate with the Defendants about their cocaine needs, collect the money, and place orders with J. Grist. Although Edwards later replaced Ratliff with Defendant Lawrence, Ratliff continued to receive cocaine from other Defendants and occasionally pooled his own funds with that of other Defendants to purchase cocaine from J. Grist.

In April 1993, state agents received an order from an Oklahoma state court authorizing the interception of telephone communications from two specific telephone numbers used by J. Grist at his home and trucking business in Atoka County, Oklahoma. Pursuant to the wiretap order, agents intercepted telephone conversations between J. Grist and Tavarez, some of which directly concerned the cocaine distribution operation involving Defendants. In particular, agents intercepted a phone call on May 7, 1993, which revealed that J. Grist planned to travel to Houston to purchase a multi-kilogram quantity of cocaine from Tavarez. On May 9, 1993, agents arrested J. Grist near Atoka, Oklahoma as he was returning from Houston. Four kilograms of cocaine were found in his possession, purchased with funds provided by Defendants Lawrence, Lewis, and Chaplin.

Following his arrest, J. Grist began cooperating with government agents regarding the drug distribution operation.[3] As part of his cooperation, J. Grist made several

[3] On June 2, 1993, a grand jury indicted J. Grist on various charges as a result of his participation in the instant drug opera-

monitored telephone calls to Ratliff informing him that a "friend" from El Paso, Texas, was planning to visit Tulsa for the purpose of distributing cocaine. Unbeknowst to Ratliff, the "friend" was an undercover DEA Agent, Joe Leszczynski. Agent Leszczynski contacted Ratliff on September 26, 1993, to discuss a potential drug transaction. In addition to his discusisons with Ratliff, Agent Leszczynski contacted Defendant Chaplin by telephone several times during October 1993 to arrange cocaine purchases. On November 2, 1993, Leszczynski called Chaplin to finalize a drug buy the next day. During this call, Chaplin discussed his past involvement with Defendants in purchasing cocaine through J. Grist.

On November 3, 1993, government agents recorded telephone calls made by a cooperating coconspirator, Herbert Grist ("H. Grist"), father of J. Grist. In these calls, H. Grist discussed a planned purchase of cocaine with Chaplin and Ratliff. Chaplin then met H. Grist at the Roadway Motel in Tulsa, in a room monitored by agents through the use of hidden video and audio transmitters. Agents observed Chaplin negotiate the purchase of one kilogram of cocaine. After Chaplin paid for the cocaine, agents arrested him.

Later the same day, H. Grist placed a telephone call to Ratliff to give him the motel and room number. However, for some reason, Ratliff did not meet H. Grist at the room and did not negotiate a purchase. Approximately 30 minutes after H. Grist spoke to Ratliff, Defendant Edwards contacted H. Grist at the motel room and arranged to meet to discuss a drug transaction. Shortly thereafter, Edwards and Defendant Lawrence met H. Grist at the motel room and agents monitored the meeting.

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tion. On September 7, 1993, J. Grist pleaded guilty to these charges. On appeal, we affirmed Grist's conviction. *See United States v. Grist*, No. 94-6049, 1995 WL 331242 (10th Cir. June 1, 1995) (unpublished opinion).

At the meeting, Edwards and Lawrence indicated that they did not want to pay cash for the cocaine but wanted it "fronted".[4] In accordance with instructions from DEA agents, H. Grist agreed to "front" two kilograms of cocaine to Edwards and Lawrence. After Lawrence took possession of the cocaine, agents arrested Edwards and Lawrence.

On January 26, 1994, Defendants were indicted for conspiracy to possess with intent to distribute cocaine and to distribute cocaine, 21 U.S.C. § 846, 841(a)(1). In addition, Defendants Edwards and Chaplin were indicted for use of a communication facility, a telephone, in facilitating, a violation of federal narcotics laws, 21 U.S.C. § 843(b). Following their indictment, Defendants moved to suppress evidence obtained pursuant to a wiretap, claiming that the wiretap order was improperly issued. The district court denied the motion. On May 5, 1994, a jury found Defendants guilty as charged on all counts. This appeal followed.

On appeal, Defendants raise the following common issues challenging their convictions: (1) whether the district court erred in failing to suppress evidence obtained from a wiretap, and (2) whether a fatal variance existed between the indictment, which alleged a single conspiracy, and the government's proof at trial, which established the existence of multiple conspiracies.

In addition to these common issues, Defendant Chaplin challenges the sufficiency of the evidence as to his conspiracy conviction. Defendant Ratliff argues the district court erred in failing to grant his motion for severance. Defendants Edwards and Lawrence contend the district court erred in admitting evidence of prior bad acts pur-

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[4] Fronting consists of a " 'credit arrangement whereby a drug buyer is given drugs in exchange for a promise to pay for them at some later date.' " *United States v. Evans*, 970 F.2d 663, 667 (10th Cir. 1992) (quoting *United States v. Mosley*, 965 F.2d 906, 915 (10th Cir. 1992)), *cert. denied*, 113 S. Ct. 1288 (1993).

suant to Fed. R. Evid. 404(b). Defendant Edwards filed a pro se supplemental brief appended to the opening brief by his attorney claiming that the district court erred by: (1) allowing "the jury selection process to continue after discovery of an impermissible disparity concerning African-Americans," and (2) denying a motion to depose Herbert Grist pursuant to Fed. R. Crim. P. 15(a).[5]

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[5] On September 11, 1995, Defendant Lawrence filed a pro se motion, styled "Request for Withdrawl [sic] of Claim of Direct Appeal of Counsel from Attorney Craig [sic] P. Bryant." In his motion, Defendant Lawrence requested that we stay his appeal so that he may convince the assistant federal public defender representing him to raise pursuant to *Anders v. California*, 386 U.S. 738, 744 (1967) a double jeopardy and an immunity issue in this direct appeal. In a July 31, 1995 letter attached as an exhibit to Defendant's motion, public defender Bryant concluded that he would not raise the issues on appeal because the issues were not raised at the district court and did not fall within the plain error exception. Public defender Bryant, however, indicated that Defendant Lawrence could prepare a supplemental brief which Bryant would in turn seek permission to file. In an order filed September 19, 1995, we denied Defendant Lawrence's motion styled "Request for Withdrawl [sic] of Claim of Direct Appeal of Counsel from Attorney Craig [sic] P. Bryant."

On September 25, 1995, three days before the September 28, 1995 oral arguments in this consolidated appeal, Defendant Lawrence filed a pro se supplemental brief. In his supplemental brief, Defendant Lawrence argues we should dismiss the indictment underlying his conviction in the instant case because the indictment violated the double jeopardy clause of the Fifth Amendment. Specifically, Defendant Lawrence contends that the indictment constituted double jeopardy because he was previously subjected to a civil forfeiture proceeding pursuant to 21 U.S.C. § 881(a)(6). We liberally construe Defendant Lawrence's pro se brief as a motion for leave to file a supplemental brief with accompanying brief, *see Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), and grant the motion to file a supplemental brief. We note, however, that a pro se party "must follow the same rules of procedure that govern other litigants." *Oklahoma Federated Gold and Numismatics, Inc. v. Blodgett*, 24 F.3d 136, 139 (10th Cir. 1994). Because Defendant Lawrence neither raised the double jeopardy issue in the district court nor asserted it in his opening brief, we do not address it. *See United States v. Griffin*, 48 F.3d 1147,

As to sentencing issues, all Defendants claim the district court erroneously calculated the quantity of cocaine used to determine their base offense levels. In addition, Defendant Edwards claims the district court improperly enhanced his sentence for (1) being an organizer or leader of the conspiracy, and (2) obstruction of justice. Defendants Lawrence and Chaplin seek to incorporate all arguments raised by their codefendants insofar as they apply to their particular appeals. We address Defendants' arguments in turn.

II. Motion to Suppress

Defendants first contend the district court erred in denying their motion to suppress evidence obtained pursuant to a wiretap. Specifically, Defendants contend that the wiretap application and order were invalid because the district attorney who applied for the wiretap order was without jurisdiction to do so. In addition, Defendant Ratliff contends the application for a wiretap contained an insufficient showing of requisite necessity for interception and that the government failed to minimize the telephone conversations monitored. On appeal from a motion to suppress, we accept the district court's factual findings unless clearly erroneous, review questions of law de novo, and view the evidence in the light most favorable to the prevailing party. *United States v. Williamson*, 1 F.3d 1134, 1135 (10th Cir. 1993).

A. *Jurisdiction of District Attorney to Apply for Order*

The wiretap order in question was obtained pursuant to the Oklahoma Security of Communications Act, Okla. Stat. Ann. tit. 13, §§ 176.1-.14. Under the federal wire-

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1151 n.6 (10th Cir.) (refusing to address Eight Amendment issue raised for first time on direct appeal from a criminal conviction), *cert. denied*, 115 S. Ct. 2630 (1995); *Codner v. United States*, 17 F.3d 1331, 1332 n.2 (10th Cir. 1994) (declining to consider issues not raised in the appellant's opening brief).

tap statute, 18 U.S.C. § 2516(2), we must defer to state law " 'on the question of the validity of [a] wiretap order obtained in state court under state law.' " *United States v. Tavarez*, 40 F.3d 1136, 1137 (10th Cir. 1994) (quoting *United States v. McNulty*, 729 F.2d 1243, 1266 (10th Cir. 1983) (en banc)). We review a district court's determination of state law de novo. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991).

Section 176.9(C) of the Oklahoma wiretap statute authorize the "interception of wire . . . communications within the territorial jurisdiction . . . of the district attorney requesting the order." Okla. Stat. Ann. tit. 13, § 176.9(C). The application for a wiretap in the instant case sought authorization to intercept telephone conversations from two telephones located in Atoka County, Oklahoma, located in Judicial District 19. The district attorney who applied for the wiretap resided in Judicial District 21, located in Cleveland County, where the agents monitored the conversations.

Under § 176.9(C), Defendants contend "interception" of communications occurs only where the tapped phones are physically located. Because the tapped phones were located in Judicial District 19, Defendants contend the district attorney for District 21 did not have authority to apply for the order because he did not reside in the district where the phones were physically located. Accordingly, Defendants contend that the wiretap authorization was invalid and that the district court should have suppressed all evidence obtained pursuant to the wiretap.

We rejected a similar challenge to the validity of the wiretap in question in *Tavarez*. In *Tavarez*, the defendant argued that the district attorney who applied for the wiretap in the instant case was without jurisdiction to do so because he did not reside in the judicial district where the tapped phones were physically located. *Tavarez*, 40 F.3d at 1138. In rejecting this argument, we held that under the Oklahoma wiretap statute, jurisdiction to

apply for an order vests not only in the judicial district where the mechanical devices are located, but also "in the place where the contents of the communication are first heard by law enforcement officials." *Id.* Because the district attorney who applied for the wiretap order resided in the district where the phone conversations were first heard by DEA Agents, we concluded the district attorney properly had jurisdiction. *Id.*

Defendants concede that our decision in *Tavarez* upheld the validity of the wiretap in question. Defendants contend, however, that they were not a party to that case and that we should reconsider the issue and reach a different result. We disagree. We are bound by our authoritative construction of the Oklahoma wiretap statute in *Tavarez* absent an intervening Supreme Court precedent or en banc reconsideration. *United States v. Brittain*, 41 F.3d 1409, 1415 (10th Cir. 1994). Accordingly, we must follow the *Tavarez* panel's construction of the Oklahoma wiretap statute in the instant case. Under *Tavarez*, jurisdiction to apply for a wiretap order under the Oklahoma wiretap statute vests "in the place where the contents of the communication are first heard by law enforcement officials." *Tavarez*, 40 F.3d at 1138. Because the intercepted communications were first heard by law enforcement officials in District 21, the district attorney for District 21 had authority to apply for the order. Thus, the district court did not err in rejecting Defendants' jurisdictional challenge to the wiretap order.[6]

B. *Requisite Necessity for Interception*

Defendant Ratliff contends the affidavit for wiretap authorization contained an insufficient showing that the wiretap was necessary for agents to determine the nature

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[6] We deny Defendant Chaplin's "Motion to Certify a Question of State Law" to the Oklahoma Court of Criminal Appeals regarding the interpretation of the Oklahoma Security of Communications Act. *See, e.g., Anaconda Minerals Co. v. Stoller Chem. Co.*, 990 F.2d 1175, 1178 (10th Cir. 1993) (declining to certify a question of state law where prior panel had decided the issue).

and scope of the criminal activity in question. Specifically, Defendant contends that the affidavit failed to indicate that normal investigative techniques were attempted and failed prior to resort to a wiretap.

" 'A wiretap authorization order is presumed proper,' and the Defendants carry the burden of overcoming this presumption." *United States v. Mondragon*, 52 F.3d 291, 292 (10th Cir. 1995) (quoting *United States v. Nunez*, 877 F.2d 1470, 1472 (10th Cir.), *cert. denied*, 493 U.S. 981 (1989)). We review de novo whether the order complies with the necessity requirement. *Id.*

In the instant case, the wiretap order was issued pursuant to the Oklahoma wiretap statute. Okla. Stat. Ann. tit. 13, § 176.9. The provisions of the Oklahoma wiretap statute are virtually identical to the federal wiretap statute. *Compare* Okla. Stat. Ann. tit. 13, § 176.9 *with* 18 U.S.C. § 2518(c). Under the Oklahoma statute, each application for a wiretap must include "[a] full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be either unlikely to succeed if tried or are too dangerous." Okla. Stat. Ann. tit. 13, § 176.9 (A)(3); *see also* 18 U.S.C. § 2518(1)(c). This is known as the necessity requirement. *See Mondragon*, 52 F.3d at 293. In addition, the judge issuing the order must make a finding that "[n]ormal investigative procedures have been tried and have failed or reasonably appear to be either unlikely to succeed if tried or are too dangerous." Okla. Stat. Ann. tit. 13, § 176.9(C)(3); *see also* 18 U.S.C. § 2518(3)(C). The purpose of these requirements is to ensure that the relatively intrusive device of wiretapping "is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Kahn*, 415 U.S. 143, 153 n.12 (1974).

In examining necessity challenges to wiretap orders, we have repeatedly held that law enforcement officials are

not required "to exhaust all other conceivable investigative procedures before resorting to wiretapping." *United States v. Apodaca*, 820 F.2d 348, 350 (10th Cir.), *cert. denied*, 484 U.S. 903 (1987); *accord United States v. Page* 808 F.2d 723, 729 (10th Cir.) ("[A] wiretap authorization can be issued even if every possible means of investigation has not been tried."), *cert. denied*, 482 U.S. 918 (1987). Consequently, we have upheld applications for wiretap orders where the application indicated: (1) several investigatory methods had been utilized prior to resort to wiretapping, *see, e.g., Page*, 808 F.2d at 729; (2) normal investigative techniques had been frustrated "by various problems local police were unable to overcome," *United States v. Armendariz*, 922 F.2d 602, 607 (10th Cir. 1990), *cert. denied*, 502 U.S. 823 (1991); (3) increased visual surveilalnce would have increased the possibility of detection, *see Apodaca*, 820 F.2d at 350; and (4) potential witnesses were unwilling to testify in court because of fear of reprisal, *United States v. Smaldone*, 583 F.2d 1129, 1133 (10th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979).

In the instant case, the application for a wiretap order set forth a full and complete statement as to the investigative techniques and procedures which had been utilized prior to resort to a wiretap. *See* Vol. 1, tab 52, ex. B. Moreover, the state court issuing the order found that "[n]ormal investigative procedures have been tried" and have been unsuccessful. *See* Vol. 1, tab 32, ex. C. We therefore conclude there was a sufficient explanation indicating that a wiretap was necessary. Thus, the district court did not err in rejecting Defendant's necessity challenge.

C. *Minimization*

Defendant Ratliff also contends that the intercepted calls were not minimized in violation of the Oklahoma wiretap statute. We conclude Defendant has failed to properly present this issue for appellate review. Fed. R.

App. P. 28(a)(5) states: "The brief of the appellant shall contain . . . an argument. . . . The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." In enforcing this rule, we have held that "[i]t is insufficient merely to state in one's brief that one is appealing an adverse ruling below without advancing reasoned argument as to the grounds for appeal." *American Airlines v. Christensen*, 967 F.2d 410, 415 n.8 (10th Cir. 1992).

In the instant case, Defendant fails to support his minimization issue with any reasoned argument or citations to the record. Indeed, Defendant has made no attempt to demonstrate how minimization efforts were improper other than a conclusory statement that "[t]here was not minimization of the telephone calls monitored." Brief of Aplt. Ratliff at 19. This isolated sentence is insufficient to adequately contest his conviction on this ground on appeal. Consequently, we do not address Defendant's minimization argument.

III. *Sufficiency of the Evidence and Variance*

Defendant Chaplin contends the district court erred in denying his motion for judgment of acquittal because the evidence was insufficient to support his conspiracy conviction. Alternatively, Chaplin joins his codefendants in arguing that there was a fatal variance between the indictment, which alleged a single conspiracy, and the government's proof at trial, which established the existence of multiple conspiracies. We address each argument in turn.

A. *Sufficiency of the Evidence*

Chaplin contends the evidence was insufficient to prove he knowingly agreed to join the conspiracy with his codefendants to distribute cocaine. Specifically, Chaplin contends the evidence fails to establish direct transactional

links, or even acquaintanceship, between him and his co-defendants. In reviewing a conviction for sufficiency of the evidence, we examine the entire record in the light most favorable to the government, and determine whether the direct and circumstantial evidence is such that any reasonable jury could find the defendant guilty beyond a reasonable doubt. *United States v. Pedraza*, 27 F.3d 1515, 1524 (10th Cir.), *cert. denied*, 115 S. Ct. 347 (1994).

In order to prove Chaplin was guilty of conspiracy with his codefendants, the government was required to prove: " '(1) agreement with another person to violate the law; (2) knowledge of the essential objectives of the conspiracy; (3) knowing and voluntary involvement; and (4) interdependence among the alleged coconspirators.' " *Id.* (quoting *United States v. Johnson*, 12 F.3d 1540, 1545 (10th Cir. 1993)). "To establish that [Chaplin] agreed to participate in the conspiracy, the [g]overnment's evidence must show a unity of purpose or a common design and understanding with coconspirators to accomplish one or more of the objects of the conspiracy." *United States v. Angulo-Lopez*, 7 F.3d 1506, 1510 (10th Cir. 1993) (quotation omitted), *cert. denied*, 114 S. Ct. 1563 (1994). "[T]he requisite agreement to act in concert need not result in any . . . formal [hierarchical] structure." *United States v. Banks*, 10 F.3d 1044, 1054 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1850 (1994).

In the instant case, the evidence was sufficient to show "a unity of purpose" among Defendants. *Angulo-Lopez*, 7 F.3d at 1510. The evidence at trial indicated that J. Grist or his trucking company employees would periodically travel to Houston to purchase cocaine, and divide the cocaine among the defendants upon return to Tulsa. In order to effectuate these purchases, Chaplin pooled his money into a common fund with his codefendants so that J. Grist could make large purchases of cocaine at a favorable price.[7] By participating in these bulk purchases,

[7] Defendants strenuously contend that there was no evidence concerning the existence of any pooling arrangement or their

Chaplin also obtained better quality cocaine. This evidence demonstrates an ongoing course of conduct between Defendants in order to achieve a common goal or purpose: to profit from the illicit distribution of cocaine. *See United States v. Fox*, 902 F.2d 1508, 1515 (10th Cir.), *cert. denied*, 498 U.S. 874 (1990); *United States v. Dickey*, 736 F.2d 571, 582 (10th Cir.) ("There was sufficient evidence to show that the conspiracy was comprise of a common goal between all participants, *i.e., to possess and distribute drugs . . . for profit.*"), *cert. denied*, 469 U.S. 876 (1984).

Chaplin contends, however, the element of interdependence is lacking in the instant case because "there is no evidence that any of his codefendants knew [him], associated with [him], or knew that [he] was also purchasing cocaine." Brief of Aplt. Chaplin at 12. Rather, Chaplin contends that the only connection between him and his codefendants was their dependence on J. Grist as the common, central drug supplier. *Id.* at 13. Thus, Chaplin argues that "[t]o find 'interdependence' among [him] and his codefendants under these circumstances would render the word meaningless." Reply Brief of Aplt. Chaplin at 17. We disagree.

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knowledge of such arrangement. Rather, Defendants contend that the evidence merely shows that "[J.] Grist got money from various persons buying from him and used the money to buy drugs from his own upstream supplier for redistribution to the buyers downstream, including the defendants."

We disagree with Defendants' characterization of the record. The record in the instant case is replete with instances showing Defendants' knowledge of a pooling arrangement with J. Grist. *See, e.g.*, Aplt. Addm. Tab. 6A, p.2 (Grist indicates to Chaplin that he cannot make a drug purchase until he obtains enough funds because "2 or 3 guys kinda got behind—an . . . it . . . kinda put me in a crunch."); *id.* Tab 10A, p.2 (Grist indicates to Chaplin that he has been unable to make a large purchase yet because "[i]t takes a pretty good amount to get very many wheels [kilograms of cocaine]."); Vol. X at 506 (indicating Edwards' knowledge that he had contributed to a $90,000 common fund that had been confiscated by police when one of Grists' couriers was arrested).

The mere presence of a central figure does not necessarily establish interdependence in a single conspiracy. *United States v. Roberts*, 14 F.3d 502, 511 (10th Cir. 1993). Rather, interdependence exists where "each coconspirators' activities 'constituted essential and integral steps toward the realization of a common, illicit goal.' " *Fox*, 902 F.2d at 1514 (quoting *United States v. Brewer*, 630 F.2d 795, 799 (10th Cir. 1980)); *see also Evans*, 970 F.2d at 671 ("What is needed is proof that [the conspirators] intended to act *together* for their *shared mutual* benefit within the scope of the consipracy charged."). Moreover, in order to establish interdependence, the government need not show that the "[c]oconspirators . . . know the identities or details of each scheme or have connections with all other members of the conspiracy." *Roberts*, 14 F.3d at 511. Rather, where large quantities of drugs are being distributed through a key distributor, "each major buyer may be presumed to know that he is part of a wide-ranging venture, the success of which depends on performance by others whose identity he may not even know." *Dickey*, 736 F.2d at 581.

We conclude the government presented ample evidence establishing the element of interdependence in the instant case. The scheme for distributing cocaine depended upon the successful achievement of several integrated steps, including transport of numerous purchases of cocaine from Houston, collection of money from Defendants, pooling of money in order to purchase large quantities of cocaine, and delivery of the cocaine to Defendants in Oklahoma for resale to cocaine consumers. *See Fox*, 902 F.2d at 1515 (finding requisite interdependence where defendants pooled funds and made several wholesale purchases of cocaine). Moreover, the fact that Chaplin's coconspirators were allegedly unaware of his identity or that he was purchasing cocaine is irrelevant. *See Roberts*, 14 F.3d at 511. By participating in purchases of large quantities of drugs, all Defendants necessarily had knowledge of participation in a greater scheme. *See Dickey*, 736 F.2d at

581. Accordingly, we find sufficient evidence from which any reasonable jury could find that Chaplin knowingly conspired with his codefendants to distribute cocaine. Thus, the district court properly denied Chaplin's motion for judgment of acquittal.

B. *Variance and Multiple Conspiracy Jury Instruction*

Defendants contends that there was a fatal variance between the indictment, which alleged a single conspiracy, and the government's proof at trial, which established the existence of multiple conspiracies. Specifically, Defendants contend that Chaplin's drug activities constituted a separate, independent conspiracy to those of his codefendants and that evidence of this separate conspiracy created a prejudicial "spillover". Additionally, Defendants contend the district court erred by failing to give a multiple conspiracy jury instruction.

1.

"A variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment." *Dunn v. United States,* 442 U.S. 100, 105 (1979). However, a variance is not fatal to the government's case unless the variance affects "the substantial rights of the accused." *Berger v. United States,* 295 U.S. 78, 82 (1935). Accordingly, where a single conspiracy is charged in the indictment, and the government proves only multiple conspiracies, a defendant who suffers substantial prejudice must have his conviction reversed. *Kotteakos v. United States,* 328 U.S. 750, 773-74 (1946).

Whether a single conspiracy existed is a fact question for the jury and we review the jury's decision in a light most favorable to the government. *United States v. Powell,* 982 F.2d 1422, 1431 (10th Cir. 1992), *cert. denied,* 113 S. Ct. 2361 (1993). In determining whether a single conspiracy existed, a focal point of the analysis is whether the alleged coconspirators' conduct exhibited interdependence. *United States v. Daily,* 921 F.2d 994,

1007 (10th Cir. 1990), *cert. denied*, 502 U.S. 952 (1991). Interdependence exists where "each coconspirators activities 'constituted essential and integral steps toward the realization of a common, illicit goal.'" *Fox*, 902 F.2d at 1514 (quoting *United States v. Brewer*, 630 F.2d 795, 799 (10th Cir. 1980)).

Defendants assert the evidence failed to show a single conspiracy because the evidence fails to show any connection between Chaplin and the other defendants. Rather, Defendants contend that the evidence essentially consists of testimony showing a number of discrete buy-sell transactions by the various codefendants from J. Grist, the supplier of the cocaine.

This argument "considerably shades and understates the relevant evidence of [Defendants'] conduct" in the instant case. *Banks*, 10 F.3d at 1055. As we have already stated, there was ample evidence demonstrating interdependence among Defendants in their scheme to purchase, transport, and deliver cocaine from Houston to Tulsa. *See supra* part III.A. Throughout this scheme, each Defendant " 'demonstrated a substantial level of commitment to the conspiracy, [for example] by engaging in a consistent series of smaller transactions' that furthered its ultimate object of supplying the consumer demand of the market." *Id.* at 1054 (quoting *United States v. Edwards*, 945 F.2d 1387, 1393 (7th Cir. 1991)). Accordingly, we conclude the evidence supports the jury's conclusion that Defendants were members of a single conspiracy as charged in the indictment. Thus, no variance existed.

2.

Even assuming a variance between the indictment and the proof at trial, Defendants are not entitled to relief unless the variance affected their substantial rights. *See Powell*, 982 F.2d at 1432 (addressing substantial rights prong even though court concluded no variance existed); *United States v. Irwin*, 654 F.2d 671, 683 (10th Cir.

1981) (same). Defendants Edwards, Lawrence, and Ratliff contend that evidence of Chaplin's alleged separate conspiracy affected their substantial rights by creating a "spillover" effect which forced them "to acquit [themselves] of Chaplin's actions."

A defendant's substantial rights are affected in the context of a variance when the jury determines a defendant's guilt by relying on evidence adduced against coconspirators who were involved in separate conspiracies. *Kotteakos*, 328 U.S. at 774. In evaluating whether a potential prejudicial spillover impermissibly affected the fairness of a trial in which a variance occurred, we have considered the following factors: (1) whether the proliferation of separate conspiracies in the case affected the jury's ability to segregate each defendant's individual actions and participation; (2) whether the variance caused confusion among the jurors as to the limited use of certain evidence; and (3) the strength of the evidence underlying the conviction. *Powell*, 982 F.2d at 1432.

Applying these factors to the instant case, we conclude Defendants' substantial rights were not affected by any alleged variance. The facts of this case were not so intricate as to render the jury unable to segregate the evidence associated with each defendant's individual actions, where there were only four defendants and alleged proof of two conspiracies. *See Berger*, 295 U.S. at 83 (upholding conviction for participation in a single conspiracy where there were only five defendants and two conspiracies proven at trial). Moreover, the district court's jury instructions minimized any possible prejudice. The court's instructions advised the jury that "[i]t is your duty to give separate and individual consideration to the evidence as it relates to each individual defendant [and] leav[e] out of consideration entirely any evidence admitted solely against some other defendant or defendants." *See* Vol. I, Tab 96, p. 6. Finally, ample evidence established a single conspiracy. *See supra* part III.B.1. We therefore conclude

that even assuming a variance existed, Defendants' substantial rights were not affected.

3.

Defendants next contend the district court erred in failing to give a multiple conspiracy jury instruction. When reviewing a challenge to jury instructions, we consider the instructions given as a whole to determine whether the instructions adequately state the law and provide the jury with an ample understanding of the issues and controlling principles of law. *Brown v. Wal-Mart Stores, Inc.*, 11 F.3d 1559, 1564 (10th Cir. 1993). We review the district court's exclusion of a jury instruction for an abuse of discretion. *Id.*

"A multiple conspiracy charge instructs the jury to acquit if it finds that the defendant was not a member of the indicted conspiracy but rather was involved in another conspiracy." *United States v. Cavin*, 39 F.3d 1299, 1310 (5th Cir. 1994). In *Evans*, we held that a district court's failure to give a multiple conspiracy jury instruction is not reversible error as long as the instructions informed the jury that " 'the government had the burden of proving beyond a reasonable doubt the [single] conspiracy as alleged, and that the evidence should be considered separately as to each individual defendant.' " *Evans*, 970 F.2d at 675 (quoting *United States v. Watson*, 594 F.2d 1330, 1340 (10th Cir.), *cert. denied*, 444 U.S. 840 (1979)). In the instant case, the jury was so instructed.[8]

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[8] The district court gave the following pertinent instructions which are virtually identical to those we approved in *Evans*:

> It is your duty to give separate and individual consideration to the evidence as it relates to each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual defendant leaving out of consideration entirely any evidence admtited solely against some other defendant or defendants.

[Continued]

Accordingly, we conclude the district court did not abuse its discretion in declining to instruct the jury on multiple conspiracies.[9]

IV. Severance Motion

Defendant Ratliff contends the district court erred in denying his motion for severance because the district court's decision to try him jointly with his codefendants prejudiced him.[10] Specifically, Defendant claims that evidence admitted against his codefendants in the form of statements made by Edwards to a police officer and a

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[8] [Continued]

> Unless otherwise stated, each defendant is entitled to have his case determined from evidence as to his own acts, statements, and conduct and any other evidence in the case which may be applicable to him.
>
> Mere similarity of conduct among various persons and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

See Vol. I, Tab 96, pp. 6, 18.

[9] Defendant Lawrence concedes the district court's instructions satisfied the standards of *Evans* and *Watson*. *See, e.g.*, Brief of Aplt. Lawrence at 19 ("These instructions appear to satisfy the standard set by this Court, in *Evans* and *Watson*."). However, Lawrence contends that we should revisit this issue and follow those circuits which have concluded that a defendant is entitled to a multiple conspiracy instruction as a theory of defense when the facts warrant such a defense. *See Cavin*, 39 F.3d at 1310; *United States v. Oreto*, 37 F.3d 739, 748 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1161 (1995); *United States v. Kennedy*, 32 F.3d 876, 884 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1995); *United States v. Dennis*, 917 F.2d 1031, 1033 (7th Cir. 1990); *United States v. Cambindo Valencia*, 609 F.2d 603, 625 (2d Cir. 1979), *cert. denied*, 446 U.S. 940 (1980). In *Evans*, we specifically rejected such an approach, *see Evans*, 970 F.2d at 674-75, and we must follow that decision. *See Brittain*, 41 F.3d at 1415.

[10] Defendants Lawrence and Chaplin also adopt this argument by reference in their brief.

videotape of the November 3, 1993 cocaine sale between the undercover agent and Chaplin, had a negative "spill-over" effect on the jury and prevented the jury from making a reliable judgment about his guilt or innocence. We disagree.

"[I]n a conspiracy trial it is preferred that persons charged together be tried together." *United States v. Scott*, 37 F.3d 1564, 1579 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 773 (1995). We review a district court's denial of a severance motion for an abuse of discretion, *United States v. Williams*, 45 F.3d 1481, 1483 (10th Cir. 1995), and "will not reverse the lower court's decision absent a strong showing of prejudice." *United States v. Wright*, 932 F.2d 868, 876 (10th Cir.), *cert. denied*, 112 S. Ct. 428, 450 (1991). Prejudice occurs when " 'there is a serious risk that a joint trial [will] compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.' " *Williams*, 45 F.3d at 1484 (quoting *Zafiro v. United States*, 113 S. Ct. 933 (1993)). "Neither a mere allegation that defendant would have a better chance of acquittal in a separate trial, nor a complaint of the 'spill-over effect' [of damaging evidence] is sufficient to warrant severance." *United States v. Levine*, 983 F.2d 165, 167 (10th Cir. 1992) (quotations omitted).

We conclude Defendant has failed to show the requisite prejudice warranting severance. As we have stated, the facts of this case were not so intricate as to render the jury unable to segergate the evidence associated with each defendant's individual actions. *See supra* part III.B.2. Moreover, the district court minimized any possible prejudice by instructing the jury that "[i]t is your duty to give separate and individual consideration to the evidence as it relates to each individual defendant [and] leav[e] out of consideration entirely any evidence admitted solely against some other defendant or defendants." *See* Vol. I, Tab 96, p. 6; *Zafiiro*, 113 S. Ct. at 938 ("[L]imiting in-

structions . . . often will suffice to cure any risk of prejudice."). Under these circumstances, we conclude the district court did not abuse its discretion in denying Defendant's motion to sever.

V. 404(b) Evidence

Defendants Edwards and Lawrence contend the district court erred in admitting evidence of prior bad acts pursuant to Fed. R. Evid. 404(b). We review the district court's decision to admit evidence under Rule 404(b) for an abuse of discretion. *United States v. Patterson,* 20 F.3d 809, 812 (10th Cir.), *cert. denied,* 115 S. Ct. 128 (1994).

During trial, the government moved to admit excerpts from testimony given by Edwards and Lawrence as government witnesses at an unrelated 1991 cocaine conspiracy trial in the Northern District of Oklahoma. The excerpts included testimony in which Edwards and Lawrence testified that they had known each other for at least five or six years and became involved in the cocaine business in 1986. Edwards testified that he had purchased two to three kilograms of cocaine from Lawrence in 1986 and began purchasing cocaine in Los Angeles and Houston for resale in Tulsa, in 1988. Lawrence testified that he and Edwards had made two or three trips to Houston to purchase cocaine, and would place the cocaine inside a spare tire before returning to Tulsa.

The government offered the prior testimony in order to rebut Defendants' contention that they were not involved in a cocaine conspiracy with each other and with J. Grist. Thus, under Rule 404(b), the government contended that the prior testimony showed knowledge of the charged conspiracy and an absence of mistake. Defendants' objected to the admission of the testimony contending that even if the evidence was admitted for a proper purpose under Rule 404(b), the evidence was more

prejudicial than probative and should be excluded. The district court overruled the objection stating that "[i]t's the view of the Court that such evidence of prior statements, activities would . . . go to the issues of motive, knowledge, opportunity, and absence of mistake or accident, and would therefore be apropriate." [11] Vol. XI at 804. The court therefore admitted the prior testimony.

Defendants contend the district court improperly admitted the prior testimony under Rule 404(b) because the evidence related to events which occurred in 1988 and was thus too remote in time to the events charged in the instant case. Consequently, Defendants contend that the probative value of the evidence was substantially outweighed by its prejudicial impact.[12]

Evidence of a defendant's prior crimes, wrongs, or acts is "admissible only for limited purposes and only when various prerequisites are satisfied." *United States v. Robin-*

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[11] Defendant Lawrence appears to suggest that the district court erred in admitting the prior testimony because it failed to articulate the specific purpose for which the evidence was admitted, but instead merely restated the language of Rule 404(b). We disagree.

We have held that "a broad statement merely invoking or restating Rule 404(b) will not suffice" to identify the specific purpose for which a district court admitted Rule 404(b) evidence. *United States v. Kendall*, 766 F.2d 1426, 1436 (10th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986). However, even if the district court fails to specifically articulate the basis for admission, the error is harmless as long as a proper purpose is apparent from the record. *United States v. Record*, 873 F.2d 1363, 1373 (10th Cir. 1989). As our analysis indicates, the specific purpose for admitting the prior testimony in the instant case is apparent from the record.

[12] Fed. R. Evid. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

son, 978 F.2d 1554, 1558 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1855 (1993). Rule 404(b) requires that

> (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) the trial court must make a Rule 403 determination of whether the probative value of the similar acts is substantially outweighed by its potential for unfair prejudice; and (4) pursuant to Fed. R. Evid. 105, the trial court shall, upon request, instruct the jury that the evidence of similar acts is to be considered only for the proper purpose for which it was admitted.

United States v. Johnson, 42 F.3d 1312, 1315 (10th Cir. 1994) (quotation omitted). " 'We have previously recognized the highly probative value of uncharged prior acts evidence to show motive, intent, knowledge or plan in the context of a conspiracy prosecution.' " *United States v. Easter*, 981 F.2d 1549, 1554 (10th Cir. 1992), quoting *United States v. Record*, 873 F.2d 1363, 1375 (10th Cir. 1989)), *cert. denied*, 113 S. Ct. 2448 (1993). This is particularly true where the uncharged acts are similar in method to the charged conspiracy and sufficiently close in time. *Id.*

Here, Defendants' prior acts involved their joint efforts regarding distribution of cocaine purchased in and transported from Houston, Texas—a similar scheme with which Defendants were eventually charged—and were sufficiently close in time to the charged conduct. *See United States v. Wint*, 974 F.2d 961, 967 (8th Cir. 1992) (narcotics offense committed five years earlier was "reasonably close in time" to charged offense), *cert. denied*, 113 S. Ct. 1001 (1993); *United States v. Drew*, 894 F.2d 965, 970 (8th Cir.) (evidence of defendant's participation in running drug house three years earlier to offense in question probative of issues of intent, knowledge, and plan), *cert. denied*, 494 U.S. 1089 (1990). In this context, the prior acts evidence was highly relevant to show Defendants'

knowledge of the plan or scheme to possess and distribute cocaine. Furthermore, the prior acts evidence rebutted Defendants' claim that they were not involved in a cocaine conspiracy with each other. *See Easter,* 981 F.2d at 1554 (upholding the admission of prior acts evidence under similar circumstances).

In addition, the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice. Although the district court did not explicitly rule on the prejudicial impact of the evidence, the court admitted the evidence following Defendants' objections based upon prejudice. Thus, "we can assume the judge weighed the prejudicial impact against the probative value of the evidence", *Patterson,* 20 F.3d at 814, before making the final determination to admit the prior testimony. Because "[w]e are required to give the trial court 'substantial deference' in Rule 403 rulings", *id.* (quoting *Easter,* 981 F.2d at 1554), we will not disturb the district court's implicit determination regarding the probative value of the evidence. *See id.* Moreover, the district court's jury instructions included an instruction limiting the use of the prior acts evidence. Under these circumstances, we conclude the district court did not abuse its discretion in admitting the prior acts evidence pursuant to Rule 404(b).

VI. Defendant Edwards' *Pro Se* Issues

A. *Composition of Jury Venire*

Defendant Edwards contends the district court erred because it "allow[ed] the jury selection process to continue after discovery of an impermissible disparity concerning underrepresentation of a fair cross-section of African-Americans" on the jury venire. According to Defendant Edwards, "[t]he seventy person jury venire presented for jury selection in this matter included only one non-caucasian, leaving a strong inference [of] . . . impropriety." Specifically, Defendant Edwards argues

that "it is beyond belief that in Tulsa County, where a 9.8% of African-Americans reside, that zero-percent African-Americans are summoned for the jury venire." [13] Defendant Edwards contends that we remand for the district court to conduct an evidentiary hearing regarding the alleged systematic exclusion of African-American venire persons.

"A criminal defendant has a Sixth Amendment right to a jury pool comprised of a fair cross section of the community." *United States v. Robertson,* 45 F.3d 1423, 1439 (10th Cir.) (citing *Duren v. Missouri,* 439 U.S. 357, 358-59 (1979)), *cert. denied,* 115 S. Ct. 2258, 115 S. Ct. 2259 (1995). To establish a prima facie violation of the Sixth Amendment-based fair-cross-section requirement,

> the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are seleced is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren, 439 U.S. at 364; *see also United States v. Yazzie,* 660 F.2d 422, 425-26 (10th Cir. 1981), *cert. denied,* 455 U.S. 923 (1982).

We conclude Defendant Edwards has failed to establish a prima facie violation of the fair-cross-section requirement. Although Defendant Edwards relies on statistics outside the record in an attempt to show that the representation of African-Americans is "not fair and reasonable in relation to the number of such persons in the community," *Duren,* 439 U.S. at 364, Defendant Edwards

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[13] In his reply brief, Defendant Edwards contends that "African-Americans comprise approximately 8.3% of the population in Tulsa County."

has failed to show that a "systematic exclusion" of African-Americans occurred. By chance, the venire had one non-caucasion. In the absence of a showing of a "systematic exclusion" of African-Americans, Defendant Edwards has failed to demonstrate a prima facie violation of the fair-cross-section requirement. *See Duren,* 439 U.S. at 364; *Robertson,* 45 F.3d at 1439. Consequently, we reject Defendant Edward's request to remand to the district court for an evidentiary hearing.

B. *Fed. R. Crim. P. 15*

Defendant Edwards next argues that the district court erred in denying his motion to depose H. Grist pursuant to Fed. R. Crim. P. 15. We disagree.

Fed. R. Crim. P. 15 governs depositions in criminal proceedings. Rule 15(a) provides in relevant part:

> (a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition . . . .

Fed. R. Crim. P. 15(a). Rule 15 "does not contemplate use of depositions of adverse witnesses as discovery tools in criminal cases." *United States v. Carrigan,* 804 F.2d 599, 602 (10th Cir. 1986). Instead, the "exceptional circumstances" standard of Rule 15(a) requires that the district court exercise "its discretion in determining whether a deposition should be taken under the particular circumstances presented." *United States v. Fuentes-Galindo,* 929 F.2d 1507, 1509 (10th Cir. 1991). We review the district court's decision regarding the taking of a deposition under Rule 15(a) for an abuse of discretion. *Id.*

Prior to trial in the instant case, the government informed Defendants that it would not call H. Grist as a

witness. H. Grist, the father of J. Grist, had acted as the cooperating coconspirator with the government in the November 3, 1993 drug transactions at the Roadway Motel. Although the government did not intend to call H. Grist as a witness, the government intended to introduce videotape at trial of the drug transactions wherein H. Grist appeared. After Defendants learned the government did not intend to call H. Grist as a witness, Defendants' investigator personally interviewed H. Grist several weeks before trial. Although the investigator interviewed H. Grist, neither Defendant Edwards nor Lawrence subpoenaed H. Grist as a witness.

On April 29, 1994, several days into the trial, Defendants Edwards and Lawrence filed a motion pursuant to Fed. R. Crim. P. 15(a) to take the deposition of H. Grist. Defendants Edwards and Lawrence argued that the deposition was necessary because H. Grist would provide exculpatory testimony. Specifically, Defendant Edwards contended that H. Grist would state that Defendant Edwards had said during the November 3, 1993 transaction at the Roadway Motel in Tulsa that he was no longer in the drug business. Further, Defendant Edwards argued that H. Grist would testify that Defendant Edwards did not go to the Roadway Motel to purchase cocaine but to visit Grist, a family friend. Defendant Lawrence argued that H. Grist would state that he did not know Defendant Lawrence before the November 3, 1993 incident, thereby negating the inference that Lawrence and Grist knew one another as coconspirators. Because H. Grist was suffering from a heart condition and in poor health, his doctor recommended that he not be deposed.

The district court first observed that H. Grist's doctor had advised against a deposition because of the fragility of his health. The district court also established that H. Grist's competency was in question because he had been subject to oxygen deprivation. Finally, the district court stated that the allegedly exculpatory information H. Grist would provide in a deposition "is not that im-

portant." Consequently, the district court denied the motion to depose H. Grist pursuant to Rule 15, Vol. IX at 361-62. Under the particular circumstances of this case we cannot say the district court abused its discretion in denying Defendants' motion to depose H. Grist pursuant to Fed. R. Crim. P. 15(a). *See Fuentes-Galindo,* 929 F.2d at 1509. Consequently, we conclude the district court did not err in denying Defendants' motion to depose H. Grist.

VII. Sentencing Issues

A. *Quantity of Cocaine*

Defendants contend the district court erroneously calculated the quantity of cocaine used to determine their base offense levels. Specifically, Defendants contend their sentences were based upon a greater amount of cocaine than was reasonably foreseeable as part of the conspiracy. We review a district court's drug quantity calculation under a clearly erroneous standard "and we will not disturb it unless it has no support in the record, or unless after reviewing all the evidence we are firmly convinced that an error has been made." *United States v. Clark,* 57 F.3d 973, 977 (10th Cir. 1995) (quoting *United States v. Cook,* 949 F.2d 289, 296 (10th Cir. 1991)).

In a drug conspiracy case, a defendant's sentence is not based merely upon " 'the amount with which the defendant dealt personally.' " *Angulo-Lopez,* 7 F.3d at 1512 (quoting *United States v. Savage,* 891 F.2d 145, 151 (7th Cir. 1989)). Rather, "[a] defendant . . . is sentenced based on the total amount of drugs involved as if the object of the conspiracy had been completed, provided that the drug quantities were reasonably foreseeable to the defendant and within the scope of his conspiratorial agreement." *United States v. Robertson,* 45 F.3d 1423, 1445 (10th Cir.) (citation omitted), *cert. denied,* 115 S. Ct. 2258 (1995). The government must prove the quantity of drugs for sentencing purposes by a preponderance of

the evidence. *United States v. Richards*, 27 F.3d 465, 468 (10th Cir. 1994). Evidence used to establish the drug quantities "must possess a 'minimum indicia of reliability.'" *United States v. Reves*, 40 F.3d 1148, 1150 (10th Cir. 1994) (quoting *United States v. Coleman*, 947 F.2d 1424, 1428 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1590 (1992)).

1. *Defendants Chaplin, Ratliff and Lawrence*

The district court attributed a quantity of cocaine in excess of fifteen kilograms to Defendants Chaplin, Ratliff, and Lawrence, yielding a base offense level of thirty-four, see U.S.S.G. § 2D1.1(c)(3) (providing for a base offense level of thirty-four for an amount of "[a]t least 15 kg but less than 50 kg of Cocaine"), and a guideline range of 151-188 months. Defendants contend that in calculating this quantity, the district court improperly sentenced them for drugs distributed independently by other members of the conspiracy because the amounts were not reasonably foreseeable. Excluding those amounts, Defendants Chaplin, Ratliff, and Lawrence contend that less than fifteen kilograms of cocaine are properly attributable to them, thus yielding a base offense level of thirty-two, *see id.* § 2D1.1(c)(4), and a guideline range of 121-151 months.

At sentencing, the district court conducted a comprehensive examination of the evidence and testimony presented at trial. Based upon the evidence and testimony presented, the court determined that while the exact amount was uncertain, the record supported a finding that an excess of fifteen kilograms of cocaine were properly attributable to Chaplin. After careful review of the record, we conclude the court's finding was not clearly erroneous. *United States v. Chatman*, 994 F.2d 1510, 1517 (10th Cir.) ("We give due regard to the district court's oportunity to judge the credibility of witnesses on whose testimony it relied."), *cert. denied*, 114 S. Ct. 230 (1993).

Accordingly, we conclude the district court did not err in calculating the quantity of cocaine attributable to Defendants Chaplin, Ratliff, and Lawrence.

2. *Defendant Edwards*

The district court attributed an amount in excess of fifteen kilograms of cocaine to Edwards in calculating a base offense level of thirty-four. *See* U.S.S.G. § 2D1.1 (c)(3) (providing for a base offense level of thirty-four for an amount of "[a]t least 15 kg but less than 50 kg of Cocaine"). In calculating this quantity, Edwards contends the district court should have excluded amounts distributed by Chaplin and those amounts distributed while he was in federal custody on unrelated charges because they were not reasonably foreseeable. We disagree.

"[A] critical factor in determining the proper sentence is the degree of any given defendant's involvement in the conspiracy." *Evans*, 970 F.2d at 679 (quotation omitted). Here, the district court, reviewing the evidence and testimony presented at trial, found that the quantities were reasonably foreseeable and properly attributable to Edwards because he organized and directed the distribution scheme and continued "in the endeavors [of the conspiracy] during that period of incarceration." Vol. XIV at 985. Giving due deference to the district court's factual and credibility determinations, we conclude the court's findings and calculations are not clearly erroneous, and we will not disturb them. *See, e.g., United States v. Gutierrez*, 48 F.3d 1134, 1139 (10th Cir.) (rejecting defendant's argument that drugs distributed were not foreseeable, in light of defendant's substantial involvement in the conspiracy), *cert. denied*, 115 S. Ct. 2598 (1995); *Banks*, 10 F.3d at 1057 (same).

B. *Organizer or Leader and Obstruction of Justice Enhancements*

1.

Defendant Edwards contends the district court erred by imposing a four-level increase in his base offense level because he "was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). Edwards contends the evidence was insufficient to support the district court's finding that he was an "organizer or leader." Specifically, he contends that because he was incarcerated during a large portion of the conspiracy, he could not have been a leader or organizer. We review the district court's finding that a defendant was a leader or organizer for clear error. *Robertson*, 45 F.3d at 1448.

A § 3B1.1(a) enhancement "is an enhancement for organizers or leaders, not for important or essential figures." *United States v. Torres*, 53 F.3d 1129, 1142 (10th Cir.) (quotations omitted), *cert. denied*, 115 S. Ct. 2599 (1995). Consequently, the gravamen of a § 3B1.1(a) enhancement is control or organization: " 'the defendant must have exercised some degree of control over others involved in the commission of the offense or he must have been responsible for organizing others for the purpose of carrying out the crime.' " *Robertson*, 45 F.3d at 1448 (quoting *United States v. Reid*, 911 F.2d 1456, 1464 (10th Cir. 1990).

In the instant case, the evidence presented at trial overwhelmingly indicates that Edwards "exercised some degree of control over others involved in . . . the offense or [was] responsible for organizing others for the purpose of carrying out the crime." *Id.* Edwards organized the conspiracy, set up an elaborate courier system through use of Grist's trucking company, and introduced Grist to Tavarez—the conspiracy's major source of cocaine—in order to

further the overall scheme of transporting cocaine from Houston to Oklahoma. Moreover, contrary to Edwards' contentions, the evidence indicates that he exercised control over various members of the conspiracy while he was incarcerated. Consequently, we agree with the district court's observation that "there's no doubt . . . that the determination that [Edwards] was a leader is established almost beyond refutation." Vol. XIV at 985. Accordingly, we hold the district court did not err in enhancing Edwards' base offense level due to his role as an organizer or leader.

2.

Finally, Edwards contends the district court erred by enhancing his sentence by two levels for obstruction of justice pursuant to U.S.S.G. § 3C1.1. This section provides for an enhancement "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." *Id.* We review the district court's factual determinations concerning obstruction of justice for clear error. *United States v. Urbanek*, 930 F.2d 1512, 1514 (10th Cir. 1991), giving due deference to the district court's ability to judge the credibility of witnesses upon whose testimony it relied. *Chatman*, 994 F.2d at 1517.

The district court based the obstruction of justice enhancement upon testimony given by one of Edwards' codefendants in a related case, Herbert Lewis. At trial, Lewis testified that during a telephone conversation, Edwards threatened him and instructed him to say as little as possible if questioned by law enforcement agents about the cocaine distribution conspiracy:

> MR. OMEILIA: During that conversation that you were having with him on the phone . . . did the defendant [Edwards] talk to you about cooperating with law enforcement?

LEWIS: Well, he said—I asked him had he heard anything about me, you know, and he said, not yet but I'm pretty sure something will come up and *if it comes to a point that you've got to testify, if you have to say anything about me, say the least possible because if you don't, then, remember I still got a cloud over your heard* [*sic*] *and*—

MR. OMEILIA: Did you respond to that?

LEWIS: What to say? And just say as least as possible.

MR. OMEILIA: Did he tell you anything to say? He told you what not to say.

LEWIS: Basically some of the things that he told me to say was different from what I told the agents, but the great—like the end of it, the end of it was correct, but the beginning as far as how I got involved in it, it was to be all put on Mr. [J.] Grist.

MR. OMEILIA: He told you to tell the agents that?

LEWIS: Yes.

MR. OMEILIA: And did you tell the agents that?

LEWIS: Yes, I did.

MR. OMEILIA: Because you had been threatened?

LEWIS: I was scared.

MR. OMEILIA: All right. And did he tell you to say anything about anybody else?

LEWIS: Yes. If you have to put it on anybody, put it on Mr. Lawrence.

Vol. VIII at 213 (emphasis added). Edwards contends that this evidence is insufficient to support an obstruction of justice enhancement because it does not show that "Edwards tried to get Lewis to make *false* statements."

Brief of Aplt. Edwards at 28. Consequently, Edwards contends that "[t]elling Lewis to provide as little information 'as possible' means nothing at all." *Id.*

Defendant's argument simply mischaracterizes the evidence presented and ignores the applicable guidelines. Contrary to Defendant's assertion, an obstruction of justice enhancement does not apply only when a defendant attempts to induce a witness to make false statements. Rather, an enhancement is warranted if the defendant "threaten[s], intimidat[es], or otherwise unlawfully influenc[es] a co-defendant, witness, or juror, directly or indirectly, or attempt[s] to do so." U.S.S.G. § 3C1.1 application note 3(a). This is precisely what the district court determined occurred here. Indeed, the court stated that "there was a concerted effort being made through that telephone conversation to alter the truth, the testimony, and that there would be repercussions if that didn't occur. That's the way Mr. Lewis took it, that's the understanding I had as I heard [the testimony], and . . . I would not be surprised if [the jury] interpreted it the same way." Vol. XIV at 979. Giving due regard to the district court's ability to judge the credibility of witnesses, we conclude the district court was not clearly erroneous in enhancing Defendant Edward's sentence for obstruction of justice.

VIII. Conclusion

In conclusion, we AFFIRM the convictions and sentences imposed by the district court as to all Defendants. We DENY Defendant Chaplin's "Motion to Certify a Question of State Law." We DISMISS Defendant Lawrence's Petition for Writ of Habeas Corpus and accompanying Motion for Evidentiary Hearing.[14]

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[14] Proceeding pro se, Defendant Lawrence has filed in this court a "Petition for Writ of Habeas Corpus and Order Discharging from Custody" and an accompanying motion requesting an evidentiary hearing. Construing Defendant's motions liberally, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972), we view them as

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seeking collateral relief from his conviction pursuant to 28 U.S.C. § 2255. *See, e.g., United States v. Rourke*, 984 F.2d 1063, 1067 (10th Cir. 1993) (liberally construing a pro se motion as one brought pursuant to § 2255); *Ray v. United States*, 295 F.2d 416, 417 (10th Cir. 1961) (petition designated as petition for writ of habeas corpus and filed in original criminal action was properly treated as a § 2255 motion). "Federal courts of appeals have no power to consider an original motion to set aside sentence under . . . § 2255." *United States v. Auman*, 8 F.3d 1268, 1272 (8th Cir. 1993) (citing cases). Rather, "[m]otions under [§ 2255] must be brought in the sentencing court, preferably before the sentencing judge who is most familiar with the case." *Carter v. Attorney Gen. of the United States*, 782 F.2d 138, 141 (10th Cir. 1986). Because we have no jurisdiction to consider Defendant's § 2255 motion, we dismiss Defendant's motions without prejudice in order that he may file them in the proper forum.

APPENDIX B

[Filed Apr. 20, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 93-CR-185-C

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MILTON EDWARDS, WILLIAM THOMAS LAWRENCE, JR.
HERBERT LEWIS, JR., KERRY CHAPLIN, and
TERRY RATLIFF,
Defendants.

ORDER

The Court has reviewed the supplemental briefs filed regarding defendants' motion to suppress evidence obtained by state agents through interception of wire communications. From consideration of the undisputed facts and relevant law, the court finds as follows.

It is undisputed that the two target telephone facilities were located in Atoka County, Oklahoma and that the listening post for the intercepted communications were located in Cleveland County, Oklahoma. The territorial jurisdiction of the requesting district attorney included Cleveland County but his jurisdiction did not extend to Atoka County. The wire tap order issued by the Presiding Judge of the Oklahoma Court of Criminal Appeals authorized an interception of telephone communications in Atoka County. The agents performing the interception leased from the telephone company a telephone number

and the service to and from that number. The telephone company provided the "binding post number" for the target telephone number and the "binding post number" for the law enforcement telephone number. The "binding post number" is different and separate from the telephone number. The law enforcement agency then connected the binding post for the target telephone number to the binding post for the law enforcement telephone through an electronic isolator, to prevent unauthorized persons from detecting the wiretap. This connection physically occurred in Atoka County. State agents monitored the listening post in Cleveland County. The electronic signals passing to and from Atoka County were received and heard in Cleveland County.

The defendants contend that the interception was unlawful because the telephone facilities where the communications were intercepted were not located in the jurisdiction of the district attorney who applied for the intercept order. The statute only authorizes an *interception* within the territorial jurisdiction of the district attorney requesting the order. 13 O.S. § 176.9(c).

The government contends that since the intercepted communications were received and heard in Cleveland County, the territorial jurisdiction requirement was met.

In determining whether an interception of wire communication by state agents in Oklahoma is lawful and within jurisdictional limitations, the Court must apply Oklahoma statutory law contained in 13 O.S. § 176.1 et al. The Court finds that the statutory language is plain and unambiguous. Oklahoma Statute Title 13, § 176.9(c) provides in relevant part:

> Upon the submission of the application, an ex parte order may be entered, as requested or as modified, *authorizing interception of* wire, oral or electronic *communications within the territorial jurisdiction* of the judicial district *of the district attorney* requesting the order if the judges of competent juris-

> diction determines on the basis of the facts submitted by the applicant that: [There is probable cause]. (emphasis added).

The statute defines "intercept" to mean the *aural acquisition of the contents of* any wire, oral or electronic *communication* through the use of electronic, mechanical or other device. 13 O.S. § 176.2(8). "Aural acquisition" means obtaining knowledge of a communication through the sense of hearing which is contemporaneous with the communication. 13 O.S. § 176.2(2). Under the statute, the aural acquisition of the communication occurred in Cleveland County, which is within the territorial jurisdiction limits of the district attorney who applied for the intercept order.

It may reasonably be argued that the Oklahoma legislature intended to restrict the telephones to be intercepted to be physically located within the jurisdiction of district attorney applying for the intercept order. However, such an argument must fail under the plain language of the authorizing statute. The Court is limited to the language contained in the statute and the language supersedes any speculation as to legislative intent. The statute covers the entire subject and creates the authority, and that is the only authority that can be enforced by the courts.

The Court finds and concludes that the wire interception was lawful and accordingly, defendants' motion to suppress evidence is denied.

IT IS SO ORDERED this 20th day of April, 1994.

/s/ H. Dale Cook
H. DALE COOK
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 94-5202, 94-5203, 94-5204, 95-5003

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

MILTON EDWARDS, TERRY RATLIFF, SR.,
WILLIAM THOMAS LAWRENCE, and KERRY CHAPLIN,
Defendants-Appellants.

ORDER

Entered December 1, 1995

Before BALDOCK, McWILLIAMS, Circuit Judges, and BROWN*, District Judge.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are

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* The Honorable Wesley E. Brown, United States District Court for the District of Kansas, sitting by designation.

in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered by the Court

PATRICK FISHER
Clerk

By: /s/ Opal Carter
OPAL CARTER
Deputy Clerk

APPENDIX D

RELEVANT STATUTORY PROVISIONS

21 U.S.C. § 841

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

* * * *

21 U.S.C. § 843

§ 843. Prohibited acts C

* * * *

Communication facility

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

* * * *

21 U.S.C. § 846

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the

same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

OKLA. STAT. tit. 13, § 176.2

176.2. Definitions

As used in the Security of Communications Act:

* * * *

6. "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system, but does not include:

a. the radio portion of a cordless telephone communication that is transmitted between the cordless telephone headset and the base unit,

b. any wire or oral communications,

c. any communication made through a tone-only paging device, or

d. any communication from a tracking device;

* * * *

8. "Intercept" means the aural acquisition of the contents of any wire, oral or electronic communication through the use of any electronic, mechanical or other device;

* * * *

OKLA. STAT. tit. 13, § 176.7

§ 176.7. Court order authorizing interception of communications

The Attorney General, upon application by a district attorney, may make application to a judge of competent jurisdiction for, and such judge may grant in conformity with the Security of Communications Act, an order authorizing the interception of wire, oral or electronic com-

munications by any law enforcement agency of this state or any political subdivision thereof having responsibility for the investigation of the offense as to which the application is made, when such interception may provide evidence of the commission of the offense of murder, the cultivation or manufacture or distribution of narcotic drugs or other controlled dangerous substances as defined in the Uniform Controlled Dangerous Substances Act, or trafficking in illegal drugs, as defined in the Trafficking in Illegal Drugs Act, and any conspiracy to commit the crimes specifically enumerated in this section.

OKLA. STAT. tit. 13, § 176.9

176.9. Application for court order—Contents—Additional evidence—Ex parte order—Specifications of order —Time limitations—Reports

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C. Upon the submission of the application, an ex parte order may be entered, as requested or as modified, authorizing interception of wire, oral or electronic communications within the territorial jurisdiction of the judicial district of the district attorney requesting the order if the judge of competent jurisditcion determines on the basis of the facts submitted by the applicant that:

1. There is probable cause for belief that an individual is committing, has committed or is about to commit a particular offense enumerated in Section 176.7 of this title;

2. There is probable cause to believe that particular communications concerning the offense will be obtained through such interception;

3. Normal investigative procedures have been tried and have failed or reasonably appear to be either unlikely to succeed if tried or are too dangerous; or

4. There is probable cause to believe that the facilities from which, or the place where the wire, oral or electronic communications are to be intercepted, are being used by an individual or are about to be used in connection with the commissions of such offense or are leased to, listed in the name of or commonly used by such person.

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